

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Atty Paul Conrad, FEMA OGC



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Brief

**“It is the sense of Congress
that the Federal
Government should be a
model employer in carrying
out the provisions of this
chapter.”**

Title 38, United States Code Section 4301(b)



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RESERVE COMPONENT/ NDMS PRESERVATION ACT

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Overview

- Who gets protections
- What are the protections
- How are they enforced



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Prerequisites for coverage

- **A civilian (non-NDMS) job**
 - **Not Independent Contractor**
[Consultant/Law firm
Partner/Union Officer]



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Prerequisites for coverage

- A civilian job
 - All employers
 - Federal
 - State
 - Private



Prerequisites for coverage

- A civilian job
- Prior notice



Prerequisites for coverage

- A civilian job
- Prior notice
 - Oral or written
 - Hint: Written/Certified Mail or Email w/ Receipt is best!



Prerequisites for coverage

- A civilian job
- Prior notice to Employer
 - Oral or written

By NDMS member or Team
Chief, Deputy Team Chief



Prerequisites for coverage

- A civilian job
- Prior notice to Employer
 - Limited military necessity exception-
 - See 42 USC § 300hh-11(e)(3)(B) – NDMS Members



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Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence



Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence
 - Cumulative
 - Some service excluded
 - Includes VRRA absences



Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence
- Honorable conditions



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Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence
- Honorable conditions
 - Proof?



Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence
- Honorable conditions
- Report back in a timely manner



Reporting rules

- Up to 30 days: safe travel + 8 hours
- 31 - 180 days: w/in 14 days
- 181 days or more: w/in 90 days
- Or else . . .



Prerequisites for coverage

- A civilian job
- Prior notice
- Less than five years absence
- Honorable conditions
- Report back in a timely manner



- **Who gets protections**
- **What are the protections**
- **How are they enforced**



Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage
- Training or other accommodations
- Special protection from discharge
- Other nonseniority benefits



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Protections

- Prompt reinstatement
- Status
- Accrued seniority
 - “Escalator” Principle
 - *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275 (1946)



Protections

- Prompt reinstatement
- Status
- Accrued seniority
 - Pension benefits



Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage



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Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage
 - During NDMS service



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Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage
 - Upon return to civilian job



Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage
- Training & accommodation



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Protections

- Prompt reinstatement
- Status
- Accrued seniority
- Health insurance coverage
- Training & accommodation
- Special protection against discharge



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Protections

- Prompt reinstatement
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- Other nonseniority benefits



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Anti-Discrimination Provision

- Employers cannot discriminate in hiring, reemployment, retention, promotion or any employment benefit because of military [NDMS] service [Sec. 4311]
- Title VII Analysis- “***A motivating factor***” -- not sole motivating factor
- No reprisals



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USERRA Anti-Discrimination Statute

- Applies to Active and Reserve military members and former military (vets), and NDMS Members but not vet's widows or spouses.
- No exhaustion of remedies requirement, but if DOL-VETs is still investigating the case, the MSPB won't act until the investigation is completed.



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USERRA Anti-Discrimination Statute

- Federal Employees may use a USERRA discrim claim as an affirmative defense against the agency, in challenging an adverse action under 5 USC 7701(c)(2) (C).
- Such a defense may be implied by the factual record, w/o the claimant raising USERRA, provided the claimant shows:



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USERRA Anti-Discrimination Statute

- He performed current or prior duty in the military forces or NDMS or has current /past military NDMS status.
 - He was denied a benefit of employment.
 - That the denial may have been based upon his duty in the military forces/NDMS.
- **WHY?** Any federal agency adverse action that fails to address an employee's military/NDMS status is not a lawful agency action.



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USERRA Anti-Discrimination Statute

- USERRA military status discrimination claim may be proved by direct evidence (Jasper) or indirect circumstantial evidence (Duncan).
- MSPB Administrative judge must make finding of USERRA jurisdiction based upon the record--giving notice to claimant of two types of proof and time to develop possible claim.



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- **Who gets protections**
- **What are the protections**
- **How are they enforced**



Enforcement



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Enforcement

- DoD: National Committee for Employer Support of the Guard and Reserve (ESGR)
- 1-800-336-4590



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Enforcement

- **ESGR-NDMS Ombudsman**

- Barbara Spurlock

- **DoL: Veterans Employment and Training Service (VETS)**

- 1-202-693-4701 (Mr. Torrans)

- Email:

- Torrans.William@dol.gov



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Enforcement

- NCESGR
- VETS
- Civil suit
 - By DoJ or OSC [Fed EE's]
 - Private action



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Private Action against Federal Employer

- Covered by Section 4324 of the Act and 5 C.F.R. Parts 200 and 1201
- Prevailing Party may be awarded reinstatement, reasonable attorney fees, expert witness fees, and court costs.
- Representation by Office of Special Counsel before MSPB or private counsel
- Federal Court may use full equitable powers of TRO, injunction, and contempt orders to get employer to comply with Act



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Private Action against Local Government or Private Employer

- Covered by Section 4323 of the Act
- Prevailing Party may be awarded reasonable attorney fees, expert witness fees, and court costs.
- Willful violation = double damages
- Federal Court may use full equitable powers of TRO, injunction, and contempt orders to get employer to comply with Act
- Problems for State Employees



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Private Action against State Government Employer

- Covered by Section 4323 of the Act
- Recent U.S. Supreme Court cases prevent State Employee from suing State Gov't Employer-must request DOJ to sue on behalf of the United States, and proceeds are provided by DOJ to the individual upon winning or settling lawsuit
- Willful violation = double damages
- Federal Court may use full equitable powers of TRO, injunction, and contempt orders to get employer to comply with Act



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Employer Defenses

[Section 4312(d)]

- **Employer Change in Circumstances [Impossibility Defense]**
- **Undue Hardship on Employer**
- **Brief and Nonrecurrent Employment**
- **Waiver or Estoppel**
- **Laches**



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NEW DEVELOPMENTS

- “Hostile Work Environment” because of military or NDMS status cases- MSPB and Federal Courts? Petersen v. Dep’t of Interior-MSPB-Yes. Fed Courts-Possibly No. Church v. City of Reno case
- *Blanket “Key Employee”* designations by federal agencies, e.g., FBI, Secret Service upheld. Dew and Thomsen cases.



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NEW DEVELOPMENTS

USERRA AMENDMENTS of 1998

- Fix for State Employee lawsuits against States [Sovereign Immunity- Eleventh Amendment Issue] Alden v. Maine---Unconstitutional?? [38 USC 4323]
- Extra-Territorial Extension of USERRA protections for American owned corporations and Federal employees worldwide [64 F.R. 31485 (11 Jun 99)]. [38 USC 4319]
 - INCLUDES AAFEES Employees



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NEW DEVELOPMENTS

- **Veterans' Benefit Improvement Act of 1996 -- Vacation Pay/Time Provision [Sec. 4316(d)] & Graham v. Hall-McMillen**
- ***NDMS member specific USERRA coverage- per 42 U.S.C. § 300hh-11(e)(3)(A) for federally activated deployments (voluntary) and federally mandated NDMS training.***



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NEW DEVELOPMENTS

- Jury Trials?? *Spratt v. Guardian Automotive* [Non-Federal Employee cases only]



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NEW DEVELOPMENTS

- Problem Areas
 - Few, if any, employers/Human Relations staffs or employment attorneys aware that NDMS members are covered under USERRA
 - Notification of ER regarding USERRA rights, obligations, and enforcement
 - Should you tell your employer of your NDMS status?



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NEW DEVELOPMENTS

- **Problem Areas**

- **No court or MSPB cases regarding NDMS USERRA issues**

- **Enforcement, Where Cases Not Voluntarily Settled - Weak**

- **Federal Employees and OSC- New Policy by Special Counsel to Enforce USERRA for Federal Workers-Special Counsel Bloch Testimony-House Vet's Affairs Committee- June 23, 2004**

- **State Employees and DOJ**



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THE END

***THANK YOU
for your attention!***

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